BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

KATHLEEN HEIKKILA and GLEN COOK,

Petitioners,

v.

CITY OF WINLOCK,

Respondent.

CASE NO. 09-2-0009c

ORDER ON DISPOSITIVE MOTION

I. SUMMARY

The City of Winlock (City) filed a Motion to Dismiss[1] the Petitioners' challenges to the City's State Environmental Policy Act (SEPA) review on the basis Petitioners failed to exhaust administrative remedies. Petitioners Heikkila and Cook filed responses on May 20[2] and May 21[3], 2009, respectively. The Board grants the City's motion.

II. DISCUSSION

Both Petitioner Cook and Petitioner Heikkila raise issues in their Petitions for Review (PFR) challenging the SEPA review process followed by the City.

> 2. The SEPA review done to analyze the impacts of the significant land use changes implemented through the Ord. 943 Development Code was wholly deficient, and is not compliant with RCW 43.21C.020, 43.21C.030, 43.21C.031, and WAC 197-11-060, 197-11-330, 197-11-340(3) 197-11-444, 197-11-926(2) as implemented through RCW 43.21C.110 and the definitions set forth in WAC 197-11-700, et seq.[4]

[1] Respondent's Dispositive Motion to Dismiss Issues Related to SEPA Review.
[2] Petitioner Heikkila's Response to Respondent's Dispositive Motion to Dismiss Issues Related to SEPA Review.
[3] Petitioner Cook's Response to Respondent's Motion to Dismiss SEPA-Related Issues.
[4] Cook Issue 2 as revised.

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> 7. Did the City of Winlock fail to comply with RCW 43.21C.020, RCW 43.21C.030, RCW 43.21C.031, and RCW 43.21C.034 when the City issued a Determination of Nonsignificance based on an Environmental Checklist Review in which the City failed to correctly reply that the revised zoning map is inconsistent with the comprehensive land-use plan and does not comply with the Growth Management Act . . .[5]

The Petitioners' issues specifically focus on the City's Declaration of Nonsignificance (DNS) issued for the development regulations under consideration by the City. Those development regulations included a revised Development Code, Critical Areas Ordinance and associated zoning maps to be applied within Winlock's city limits and its urban growth boundary. The City issued the DNS on October 13, 2008.

Winlock Ordinance No. 933 establishes, among other things, the position of Hearing Examiner, sets forth the jurisdiction of the Hearing Examiner, and establishes deadlines for filing appeals of matters within the Hearing Examiner's jurisdiction. [6]

Following issuance of the DNS the City published a Notice of DNS on October 15, 2008 which included information regarding appeals from those aggrieved by the DNS.[7] The Notice established a 15 day appeal filing deadline.[8] Assuming jurisdiction, any appeal to the Hearing Examiner pursuant to the City's process should have been filed by October 31, 2008. It is undisputed that neither of the Petitioners appealed the SEPA determination to the Hearing Examiner.

The City argues that a petitioner alleging noncompliance with SEPA must exhaust all administrative remedies prior to seeking review before the Growth Management Hearings Board, citing *Citizens for Clean Air v. Spokane*, 133 Wn. 2d 455, and RCW 43.21C.075(4).

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[5] Heikkila Issue 7, in part.
[6] Exhibit 175.
[7] Exhibit 168.
[8] Exhibit 168. Although Ord. 933 provides for a 10 calendar day appeal period, the published Notice provided for 15 days. The City has acknowledged that the 15 day period would apply in this instance.

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> Appellants failed to prove or even allege that they have done anything to exhaust their administrative remedies. There is no evidence in the record that appellants filed an administrative appeal. Where the record fails to show that an aggrieved party has attempted to use the administrative appeals process, the court will conclude that no appeal was made. The trial court therefore properly dismissed the SEPA claim. [9]
>
> If a person aggrieved by an agency action has the right to a judicial appeal and if an agency has an administrative appeal procedure, such person shall, prior to seeking any judicial review, use such agency procedure if any such procedure is available, unless expressly provided otherwise by state statute.[10]

The City states it has adopted a specific administrative appeal process as referenced in RCW 43.21C.075(4), that notice of the DNS was published, and that Petitioners failed to file administrative appeals within the time allowed. The City claims the SEPA challenges must be dismissed.

Both Petitioners' responses reference the Board's 1999 decision in *Island County Citizens' Growth Management Coalition v. Island County.*[11] In *Island County*, the Board clearly held that the SEPA review exhaustion requirement of RCW 43.21C.075 did not apply to petitioners' challenges before the Western Growth Management Hearings Board. Following that argument, Heikkila focuses on three separate and distinct legal concepts: standing, timeliness, and jurisdiction.

Standing, timeliness, and jurisdiction are distinct legal concepts separate and apart from the exhaustion of remedies requirement. One may have standing and file a PFR on a timely basis challenging an issue over which the Board has jurisdiction yet, if the doctrine of exhaustion applies, such a person may be denied redress. The Board need only address the exhaustion requirement in this Order. The City has not challenged Petitioners' standing, the timeliness of their PFR filings, or the jurisdiction of the Board.

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[9] Citizens for Clean Air at 465.
[10] RCW 43.21C.075(4).
[11] WWGMHB Case No. 98-2-0023c, Order on Motions to Dismiss, March 1, 1999.

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Petitioner Cook sets forth an additional argument: that Winlock Ordinance No. 933 does not provide a SEPA appeal mechanism to the Hearing Examiner and thus the exhaustion requirement does not apply. Cook asserts Ordinance No. 933 does not grant the Hearing Examiner jurisdiction to hear appeals pertaining to area-wide rezones, comprehensive plan amendments, and development regulations. Cook suggests that the Examiner's duties are limited to land-use decisions and Ordinance No. 933's definition of a "land-use decision" specifically excludes applications for legislative approvals such as area wide rezones. Cook states that an area wide rezone is exactly what is involved in the matter before us.

Cook's argument is not well taken. Section 9 of Ordinance No. 933 lists the duties of the Hearing Examiner and specifically includes hearings under Chapter 43.21C RCW, the State Environmental Protection (sic) Act.[12] Furthermore, Section 11 specifically references administrative SEPA appeals and states:

> All administrative SEPA appeals involving procedural issues (e.g., the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement) or substantive determinations under SEPA shall be consolidated with any appeal/hearing before the examiner on the underlying governmental action.[13]

Beyond that, Cook' s Issue 2 is not a challenge to the City's area-wide rezone, but rather to the City's SEPA review. The Hearing Examiner has jurisdiction over administrative SEPA appeals.

The Growth Management Hearings Boards have taken different positions regarding exhaustion of administrative remedies under SEPA. The position of the Western Board regarding SEPA administrative exhaustion is one that appears to have been evolving over time. When the issue was before the Board in *Island County Citizens' Growth Management Coalition v. Island County,* as the Petitioners in this matter point out, the Board disagreed with the Central Board's position that, since the Boards are quasi-judicial in nature, the

[12] Exhibit 175 at 004006.
[13] Exhibit 175 at 004007.

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requirement set forth in SEPA requiring exhaustion prior to judicial review was applicable to the Boards. As Petitioners state, the Western Board concluded:

> [The Central Board's decision] appears to be based upon the conclusion that since GMHBs are quasi-judicial bodies that the rules for judicial review are applicable. We disagree with that conclusion. Rather, the quasi-judicial nature of a GMHB categorizes us as part of the administrative review process. Therefore, the exhaustion requirement for judicial review does not apply, particularly in light of the clear language of RCW 36.70A.280(1).[14]

However, in *WEAN v. Island County,* Case No. 03-2-0008,[15] the Western Board noted that exhaustion is not required if a jurisdiction provides no administrative appeals process. Although the Board made no direct ruling on the exhaustion question, the quoted language of *WEAN* appears to reflect a change in the Board's historic position – that the exhaustion requirement for SEPA was only needed prior to "judicial review". Otherwise, the existence of a local appeals process, or lack of same, would have merited no comment.

In *Hapsmith v. Auburn*,[16] the Central Board concluded that an issue which raised a DNS SEPA challenge should be dismissed as the Petitioner failed to pursue an available administrative remedy prior to raising the issue before the Board. The Central Board in its analysis first cited RCW 43.21C.075(4) quoted above.

Central also cited *State v. Grays Harbor County*, 122 Wn. 2d 244, in which the Supreme Court said:

> It is settled under the SEPA statute that if an agency accords an aggrieved party an opportunity for administrative review, it must be exhausted before judicial relief is sought.[17]

That Court referred to exhaustion as a "strict . . . requirement in SEPA cases".[18]

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[14] Island County Citizens'; Order on Motions to Dismiss, May 1, 1999.
[15] FDO, August 25, 2003.
[16] Hapsmith v. City of Auburn, FDO, May 10, 1996.
[17] State v. Grays Harbor County at 249.
[18] State v. Grays Harbor County at 249.

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In *Hapsmith*, the Central Board set forth the factors which must be considered to determine whether the exhaustion requirement bars a SEPA claim:

> (1) whether administrative remedies were exhausted ; (2) whether an adequate remedy was available; (3), whether adequate notice of the appeal procedure was given; and (4) whether exhaustion would have been futile.[19]

After full consideration of the facts and application of those facts to the applicable law, the Central Board in *Hapsmith* dismissed the SEPA based claim.

The Eastern Board, taking a position similar to that of the Central Board, has specifically held that SEPA's requirement for the exhaustion of administrative remedies must be satisfied. *South Neighborhood Council v. City of Spokane,* Case No. 08-1-0004[20] In concluding that some of the petitioners had complied with the City's administrative process while others had not, Eastern set forth the bases for the exhaustion requirement, quoting from *Citizens for Mount Vernon v. Mount Vernon*[21]:

> …the exhaustion of remedies doctrine is based on a number of legal policies. The doctrine: (1) avoids premature interruption of the administrative process; (2) provides for full development of the facts, and (3) allows the exercise of agency expertise. The exhaustion of administrative remedies also protects the autonomy of administrative agencies, such as the City Council, by giving them the opportunity to correct their own errors, and discourages litigants from ignoring administrative procedures by resort to the courts, while allowing the administrative review process to run its course.[22]

The issue which appears to have led the Board in *Citizens' Growth* to conclude administrative exhaustion was not required is the reference in RCW 43.21C.075(4) to "judicial review". That Board held that the quasi-judicial nature of the Boards made them a part of the administrative review process. While that may be partially accurate, the function of the Growth Management Hearings Boards is comparable to a judicial forum when

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[19] Citizens for Clean Air at 26.
[20] South Neighborhood Council, Order on Motions, October 6, 2008.
[21] 133 Wn. 2d 861, 866.
[22] South Neighborhood Council, Order on Motions, October 6, 2008 at 11.

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reviewing local government, or "agency", SEPA actions. Furthermore, the underlying bases for the exhaustion requirement set forth in *Citizens for Mount Vernon* are clearly met by requiring administrative exhaustion prior to appeal to the Growth Management Hearings Boards: (1) it avoids premature interruption of the administrative process; (2) it provides for full development of the facts, and; (3) it allows for the exercise of agency expertise. Finally, as also noted in *Citizens for Mount Vernon*, the requirement protects the autonomy of administrative agencies, such as a city council, by giving them the opportunity to correct their mistakes, and discourages litigants from ignoring administrative procedures by resort to the courts (or the Growth Management Hearings Boards) while allowing the administrative review process to run its course.

The Board concludes that the reasoning of our colleagues on the Central and Eastern Boards is persuasive and we hereby overrule the prior holding of the Western Board in regards to the need to exhaust administrative remedies prior to seeking review of a SEPA decision before the Board. RCW 43.21C.075(4) establishes a requirement for exhaustion of administrative remedies. The City provides an administrative appeals process through Ordinance No. 933. The DNS and the published notice described the appeals process including the requirement that an appeal be filed within 15 days.[23] Neither Cook nor Heikkila filed an appeal. Because Petitioners failed to utilize the administrative appeal process available to them before seeking review before the Board, Petitioners failed to exhaust their administrative remedies and dismissal of Cook Issue 2 and Heikkila Issue 7 is appropriate.

[23] See footnote 8.

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III. ORDER

Based on the foregoing, the Board grants the City's Motion. Cook Issue 2 and Heikkila Issue 7 are dismissed.

Dated this 29th day of May, 2009.

_____
William Roehl, Board Member

_____
James McNamara, Board Member

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Nina Carter, Board Member

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